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IN THE SUPREME COURT OF THE UNITED STATES

GWENDOLYN MITCHELL, Warden, *Petitioner*,

v.

SHIRLEY REE SMITH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
PETITIONER'S REPLY MEMORANDUM	1
I. THE NINTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT IN PLACE OF THE STATE COURTS' IN REJECTING EXPERT OPINION REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE AT TRIAL	2
II. THE NINTH CIRCUIT FAILED TO HONOR---- AND THE OPPOSITION BRIEF WHOLLY FAILS TO DISCUSS—THE DEFERENTIAL-REVIEW RESTRICTIONS IMPOSED ON THE FEDERAL COURTS BY AEDPA	6
III. SMITH'S SUGGESTION THAT JACKSON MIGHT NOT APPLY TO EXPERT TESTIMONY CANNOT JUSTIFY THE NINTH CIRCUITS'S FAILURE TO REVIEW THE STATE COURT DECISION DEFERENTIALLY UNDER AEDPA	7
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Cases	
Jackson v. *Virginia*, 443 U.S. 307 (1979)	1, 2, 6-8
Rice v. *Collins*, 126 S. Ct. 969 (2006)	6
Smith v. *Mitchell*, 453 F.3d 1203 (9th Cir. 2006)	3, 5
Statutes	
28 U.S.C. § 2254	1, 6

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PETITIONER'S REPLY MEMORANDUM

The Question Presented is whether the Ninth Circuit correctly applied the deferential standard for habeas corpus review under 28 U.S.C. § 2254(d) when it granted relief on an insufficient-evidence claim regarding cause of death by accepting the expert testimony of defense experts over the contrary opinions of prosecution experts believed by the jury and found sufficient by the state appellate court. Constitutional sufficiency review is conducted under the deferential "any rational factfinder" standard defined in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). State adjudications of sufficiency claims are also insulated by the additional layer of protection afforded by AEDPA, which precludes federal habeas relief unless the state judgment is an objectively unreasonable application of clearly established Federal law.

In this case, the Ninth Circuit panel lost sight of both layers of deference. The Ninth Circuit first re-weighed the evidence and chose to credit the defense experts who were disbelieved by the jury, thus disregarding the deference demanded by *Jackson*. The Ninth Circuit exacerbated its error by concluding that the state appellate court's finding of sufficient substantial evidence

to support the jury's verdict was an objectively unreasonable application of *Jackson*, a conclusion that was possible only by ignoring the additional layer of protection for state judgments mandated by AEDPA

I.

THE NINTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT IN PLACE OF THE STATE COURTS' IN REJECTING EXPERT OPINION REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE AT TRIAL

1. In her brief in opposition to the petition for certiorari, Smith first argues that this is not a case involving a conflict of expert opinion at all, and that the Ninth Circuit did not simply substitute its preference for the defense expert opinion on cause of death for the jury's decision crediting the prosecution experts. Smith contends that this a case in which there was *no* evidence to support the opinion of the three prosecution experts that the cause of death was violent shaking. More specifically, Smith asserts that there "was no observable physical trauma to the infant, either internally or externally." Opp. 19. Smith even contends that the prosecution experts *agreed* that there was "no physical or circumstantial evidence to support the hypothesis" which they presented. Opp. 15. These assertions are completely belied by the record in this case.

All three prosecution expert witnesses testified that Etzell Glass's death was caused by violent shaking. Dr. Carpenter, the autopsy supervisor, testified that death from violent shaking can occur in three different ways: (1) massive swelling of the brain; (2) massive bleeding sufficient to crush the brain stem; *or* (3) a shaking "so violent that it destroys the vital centers in the brain and is a quick death." All the prosecution experts found that the cause of death in this case was violent shaking resulting in immediate death. Two defense experts disagreed on the ground that the autopsy did not find massive swelling or bleeding in the

brain, and offered the opinion that the Shaken Baby Syndrome diagnosis was ruled out by the absence of observable brain stem shearing. Dr. Carpenter and Dr. Erlich, two of the prosecution experts, in turn, disputed the defense theory and testified that the presence of visible brain stem damage was not essential to the diagnosis of death by violent shaking. More important, the prosecution experts explained why the swelling and bleeding and visible brain stem shearing did not develop in this case: the shaking was so violent that it caused virtually instantaneous death, thus cutting off the infant's circulation.

In light of this testimony, it cannot be said that this is a case in which there was no evidence to support the opinions of the prosecution witnesses. It is, simply, a case involving a conflict of expert opinion testimony. The jury was asked to choose between two directly conflicting accounts of the cause of death, and to resolve a fundamental point of disagreement. In Judge Bea's apt formulation, the question for the jury was whether "to be valid, does a doctor's opinion that a baby died from violent shaking require evidence, visible on autopsy, of brain stem shearing?" Pet. App. G; *Smith* v. *Mitchell*, 453 F.3d 1203, 1206 (9th Cir. 2006). The jury answered no, clearly accepting the opinion and the explanations of the prosecution witnesses. When the jury chose to believe the prosecution experts, it acted on the basis of substantial evidence.

In addition to the expert testimony, the prosecution relied on other significant inculpatory evidence, none of which is even mentioned in the opposition brief. As the magistrate judge correctly noted, Smith made several statements that reasonably could be taken as admissions of guilt. Smith was alone with Etzel at the time of his death. She admitted that when she picked him up, his head "flopped back." She also admitted that she shook or "jostled" or "twisted" him when he appeared to be unconscious. In response to questions from a social worker, Smith said, "Oh, my God. Did I do it? Did I do it? Oh, my God." When Smith's daughter told her, "If it wasn't for you, this wouldn't have happened," Smith did not reply. Combined

with the expert testimony, this too is substantial evidence of guilt amply supporting the verdict.

2. Smith's attempt to argue that this was not a case of conflicting expert opinion as to the cause of death, but rather a case in which the prosecution experts offered *no* objective physical evidence to support their opinion that the cause of death was Shaken Baby Syndrome, finds no support in the record.

During the autopsy, Dr. Erlich noted one or two tablespoons of fresh blood on the top of the child's brain, a fresh blood clot between the hemispheres of his brain, recent hemorrhaging around his optic nerves, a small quantity of fresh subarachnoid blood, and a small bruise and recent abrasion at the lower-back part of his head. See Pet. for Cert. 4. Dr. Carpenter found that "there was a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore." See Pet. for Cert. 4.

Dr. Carpenter used the observations of these recent injuries to substantiate his opinion that violent shaking was the cause of death. He opined that the subdural and subarachnoid blood, together with the bleeding around the optic nerves, "showed trauma to the head sufficient to cause the death of the infant." He testified that the injuries to the child's head probably occurred during the shaking incident as the child's head collided with a hard, rough surface.

The prosecution experts explained that the observable trauma they had noted showed a shaking so violent that it destroyed the vital centers in the infant's brain and resulted in very rapid death. This rapid death resulted in trauma to the brain stem that *could not* be seen because the child's circulation had been shut down. All three prosecution experts testified that some of the effects of the trauma often seen in cases of Shaken Baby Syndrome simply did not have time to develop in this case. See Pet. for Cert. at 3-5. In Judge Bea's succinct

summary, "the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions." Pet. App. G; *Smith*, 453 F.3d at 1208.

In short, this is a case involving a straightforward conflict of expert opinion testimony. There is simply no basis for the view expressed in the opposing brief and in the Ninth Circuit panel opinion that there was *no* evidence of trauma to support the testimony of the prosecution witnesses. The prosecution experts "reached their conclusion [on cause of death] *despite* the lack of visible shearing, not because of it, and explained why." Pet. App. G; *Smith,* 453 F.3d at 1206 (Bea, J., dissenting).

3. The California appellate court, reasonably and correctly, rejected Smith's claim of constitutionally insufficient cause-of-death evidence, finding that the jury resolved the conflict between the experts on the basis of substantial evidence from the prosecution experts, as well as the additional inculpatory circumstantial evidence of respondent Smith's guilt. When the Ninth Circuit disagreed and granted habeas relief, finding the defense theory more plausible because the death did not occur in the "usual manner" of Shaken Baby Syndrome deaths, the panel "stepped over the line dividing the province of the jury from that of the court," as Judge Bea aptly put it in his dissent from the denial of rehearing *en banc*. Pet. App. G; *Smith,*, 453 F.3d at 1206. In this manner, the Ninth Circuit panel failed to apply the deferential substantial evidence rule in reviewing the claim of insufficiency of evidence of cause of death.

II.

THE NINTH CIRCUIT FAILED TO HONOR---AND THE OPPOSITION BRIEF WHOLLY FAILS TO DISCUSS—THE DEFERENTIAL-REVIEW RESTRICTIONS IMPOSED ON THE FEDERAL COURTS BY AEDPA

The state's petition also established that in addition to its misapplication of the *Jackson* standard, the Ninth Circuit failed to review the state court denial of the claim of insufficient evidence of cause of death with the deference required by AEDPA. Under AEDPA, a federal habeas may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Ninth Circuit failed to recognize or respect this additional layer of protection for the state court adjudication. Smith's opposing brief does not even mention AEDPA, let alone explain how the Ninth Circuit's analysis defers to the state court judgment in any way at all.

As the state's petition explained (Pet. 12), the Ninth Circuit in this case recited the proper standard of review but then promptly ignored it. It thus repeated the error that drew this Court's rebuke just last term in *Rice* v. *Collins*, 126 S. Ct. 969, 971-76 (2006), where this Court reversed the Ninth Circuit because it had failed to apply any real AEDPA deference and had substituted its own evaluation of witness credibility for the conclusions of the state fact-finder. See *Rice*, 126 S. Ct. at 973.

The panel in this case did not respond to this admonition, and Smith's opposition brief makes no effort to explain or justify the panel's default. Indeed, Smith does not even mention AEDPA, let alone offer an account of just how the Ninth Circuit opinion satisfies AEDPA's requirement of deference to objectively reasonable state court adjudications.

It was not "objectively unreasonable" under the "clearly established Federal law" set forth in *Jackson* for the state courts

to find that there was a conflict of expert opinion on the cause of death that was resolved by the jury in favor of the prosecution's expert theory on the basis of substantial evidence. Under AEDPA, the Ninth Circuit had no warrant to second-guess this reasonable conclusion, let alone to substitute its own determination of the relative credibility of conflicting expert testimony for the state court jury's decision or the state appellate court's finding that substantial evidence supported the jury's verdict.

The opposition brief simply analyzes and attempts to defend the decision of the Ninth Circuit panel as a proper *de novo* consideration of the sufficiency claim. Although that is, in fact, the way the panel approached the issue, *de novo* review is forbidden by AEDPA. Both the panel and the opposition brief simply disregard AEDPA's stringent limits on the power of federal courts to overturn state judgments.

III.

SMITH'S SUGGESTION THAT JACKSON MIGHT NOT APPLY TO EXPERT TESTIMONY CANNOT JUSTIFY THE NINTH CIRCUITS'S FAILURE TO REVIEW THE STATE COURT DECISION DEFERENTIALLY UNDER AEDPA

The petition demonstrated that virtually every court that has considered the issue has held that the substantial evidence rule and the deference that it mandates apply to judicial review of a jury's resolution of conflicts in expert witness opinion testimony. The strong consensus is that reviewing courts are simply not empowered to make their own assessment of which experts are more persuasive or credible, or which expert hypothesis seems more apt or accurate.

In support of this contention, the petition cited cases from many circuits and state jurisdictions that have applied the familiar test for sufficiency review found in *Jackson* to conflicts in expert opinion testimony. In her opposition brief, Smith tries

to distinguish the cases cited in the petition on the ground that they do not support petitioner's contention. In so doing, Smith appears to argue that the traditional standard of sufficiency review found in *Jackson* does not apply to the review of conflicts between expert witnesses, and suggests that the Ninth Circuit properly employed a different standard to review the conflicts between experts found in this case. Smith offers no authority for this new rule, and no justification for it. And her suggestion about doubt with respect to the applicable rule does not help in identifying the "clearly established Federal law" that sets the basic limit on federal habeas corpus review of state-court decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 29, 2007

Respectfully submitted,

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